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In The

OFFICE OF THE CLERK

Supreme Court of the United States

October Term, 1998

CHARLES WILSON, GERALDINE WILSON and RACHEL SNOWDEN, next friend/mother of VALENCIA SNOWDEN, a minor,

Petitioners,

vs.

HARRY LAYNE, JAMES A. OLIVO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION and BRIAN E. ROYNESTAD,

Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit*

REPLY BRIEF FOR PETITIONERS

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Respondents concede the existence of a circuit conflict, but in an effort to convince the Court not to grant this petition, they advance a factually untrue and legally immaterial argument that was neither relied upon or addressed by the courts below.

I.

Respondents claim that “[t]he most important fact about this case . . . is that respondents were following the terms of a binding and apparently valid policy issued by the U.S. Department of Justice,” opp’n at 4, and “simply were not at liberty to depart from that policy or to refuse to implement its terms.” Opp’n at 7. This claim is precisely contrary to Respondents’ own sworn testimony:

- “I don’t know of any authority anywhere about press.” J.A. 132. (Deposition of Joseph L. Perkins taken Apr. 25, 1995, at 59.)
- “I’m not familiar with the policy with the press.” J.A. 119. (Deposition of Mark A. Collins taken Apr. 24, 1995, at 157.)
- Q. “Did you inquire or was there any discussion with Harry Layne, when he instructed you to take the media along with you, whether or not the media would be allowed to go into private residences?”
A. “There was no instruction.” J.A. 131. (Perkins Dep. at 54.)

The uncontested evidence in the record establishes beyond any doubt that Respondents were never aware of the “policy” that they now claim to have been following. In addition, there is no evidence in the record that anybody ever instructed or authorized Respondents — either pursuant to a policy or otherwise — to take the media with them into private dwellings without consent.¹

1. Again, the record evidence indicates just the opposite. Three of the six Respondents in this case are Montgomery County deputy sheriffs. The Sheriff of Montgomery County, Raymond Kight, testified under oath that it was the policy of the Montgomery County Sheriff’s Department to never let civilians who were not providing law enforcement assistance into private homes: “We would never let a civilian into a home or anywhere else where we have a person that – that’s in custody. . . . That’s just not allowed.”

(Cont’d)

Although Respondents' sworn testimony is damning enough, their "just following a policy" claim is also undermined by the actual language of the document that they call a "Justice Department policy." To begin with, by its very terms, the document is not a "policy" at all. It refers to itself simply as a "booklet" that has "attempted to address some of the basics of media ride-alongs." App. 5a.² The final paragraph of the booklet advises marshals to call the "Office of Congressional and Public Affairs" with any media ride-along questions not addressed and concludes: "We will make every effort to help you plan for a most successful ride-along." App. 6a. This document, trumpeted as a "binding Justice Department policy" that Respondents "simply were not at liberty" to disobey, is nothing more than a media relations guide prepared by the Office of Congressional and Public Affairs.

The existence of this media ride-along booklet, moreover, is really beside the point. Petitioners have no quarrel with "media ride-alongs" or with an informational booklet providing suggestions on how to conduct them. Petitioners' sole complaint — and the sole issue raised by the question presented here — is with officers bringing the media inside private residences without the occupants' consent. The media ride-along booklet nowhere authorizes or instructs deputy marshals to do this. The only language in the booklet upon which Respondents rely to justify their conduct in this case is this sentence: "If the arrest is planned to take place inside a house or building, agree ahead of time on when the camera can enter and who will give the signal." App. 2a; opp'n at 3. This lone reference hardly amounts to a binding

(Cont'd)

J.A. 147. Sheriff Kight also testified that his deputies knew better than to allow civilians participating in ride-alongs inside people's homes: "My deputies knew not to do that. And I would believe that the homeowner, if that happened, you know, would have some measure of grievance that that occurred." J.A. 148.

2. For the Court's convenience, the booklet is included as an appendix to this reply. Although the booklet appears to be missing every other page, for reasons unknown to Petitioners, this is the only form in which Respondents placed it in the record below.

order to respondents to take the press with them into a home without the occupants' consent and is perfectly consistent with Petitioners' view that no members of the media should have been allowed to enter Petitioners' home until they had received "the signal" that Petitioners had indeed provided that consent.

Respondents also neglect to point out language in the booklet that undercuts their argument that they were somehow authorized or instructed to do what they did here. For example, the booklet describes as "essential" the establishment of ground rules and advises deputy marshals to convey those ground rules to reporters. App. 2a. Two ground rules that the booklet specifically identifies are those addressing "what can be covered with cameras and when" and "any privacy restrictions that may be encountered." App. 2a.

These facts explain why the courts below never addressed this argument or relied upon it as a basis for their decisions. It is simply not an issue here.

II.

Although the "just following a policy" argument is factually untrue, it is also immaterial. The argument merely begs the question whether Respondents violated clearly established law when they brought the media into Petitioners' home without consent. Petitioners cannot win this case unless the Court is convinced that taking the media into a private dwelling without the occupants' consent violated clearly established law of which a reasonable officer in April 1992 would have been aware. Case law is uniform in finding that a policy, order, statute or regulation directing a government official to engage in clearly unlawful conduct is no shield to liability. See, e.g., *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994) ("[I]ndividuals cannot always be held immune for the results of their official conduct simply because they were enforcing policy or orders. . . . Where a statute authorizes official conduct which is patently violative of fundamental constitutional principles, an officer who enforces that statute is not entitled to qualified immunity."); *J.H.H. v. O'Hara*, 878 F.2d 240, 245 n.4 (8th Cir. 1989) ("An official's actions are not immunized because they were taken according to orders or

regulations if the defendant still knew or should have known he was violating plaintiff's constitutional rights"); *Forsyth v. Kleindienst*, 599 F.2d 1203, 1217 (3rd Cir. 1979) ("if [FBI agents] knew or should have known that their actions were violating the plaintiff's constitutional rights, then they will not be allowed to hide behind the cloak of institutional loyalty" by claiming they were simply following orders). The cases cited by Respondents in their Brief in Opposition at 5 and 6 do not say otherwise. Those cases merely stand for the proposition that an officer following an unconstitutional policy is entitled to qualified immunity so long as the policy being followed is not so *clearly* unconstitutional that a reasonable officer would have known it was unconstitutional.

III.

Notwithstanding Respondents' efforts to convince the Court otherwise, this case addresses the issue of qualified immunity in a typical factual situation that has recurred and continues to recur frequently. This case, accordingly, presents a proper vehicle for resolving the conflict in the circuits and ensuring uniformity in the decisions of lower courts as they continue to be presented with cases like this one. As in so many other recent cases, law enforcement officials in this case brought representatives of the media with them into a private dwelling without the occupants' consent.³ The one notable exception to this typical factual situation

3. The cases identified in the Petition that also involved law enforcement officials bringing the media with them into a private dwelling without the occupants' consent are: *Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996), cert. denied, 117 S. Ct. 1081 (1997); *Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996); *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), cert. denied, 514 U.S. 1062 (1995); *Hagler v. Philadelphia Newspapers, Inc.*, C.A. No. 96-2154, 1996 WL 408605 (E.D. Pa. July 12, 1996); *Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio Jan. 6, 1984); *Higbee v. Times-Advocate*, 5 Med. L. Rptr. 2372 (S.D. Cal. Jan. 9, 1980); *Prahl v. Brosamle*, 295 N.W. 2d 768 (Wis. Ct. App. 1980); see also *Reeves v. Fox Television Network*, 983 F. Supp. 703 (N.D. Ohio 1997) (occupant of home sued production company of the television show *COPS* for invasion of privacy caused by television camera crew recording encounter with police inside his home); *Minerva Canto, Baseball All-Star's Widow Suing L.A.*, L.A. Daily (Cont'd)

is presented by *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), petitions for cert. filed, 66 U.S.L.W. 3783 (May 26, 1998) (97-1914 and 97-1927), a case currently pending before the Court. In *Berger*, the media never entered the Bergers' home.⁴

In the three months since this petition was filed, decisions in two more factually indistinguishable cases have been published. In each of those cases the court found law enforcement officials liable for bringing the media into private buildings without the occupants' consent, even though, at the time of the underlying events, no court had ever found such conduct to be unconstitutional. See *Swate v. Taylor*, No. CIV.A. H-94-727, 1998 WL 639314 (S.D. Tex. Aug. 28, 1998) (DEA agent accompanied by television crew from *60 Minutes* in Spring of 1992, and who was following direct orders, not entitled to qualified immunity for search of privately-owned methadone clinic); *Barrett v. Outlet Broadcasting, Inc.*, No. Civ.A. C-2-94-074, 1997 WL 909475 (S.D. Ohio Sept. 18, 1997) (police officers acting pursuant to a media ride-along policy and who were following direct orders on January 27, 1993 not entitled to qualified immunity when they permitted a local television news crew to accompany them into a private home in response to a 9-1-1 call). The publication of *Swate* and *Barrett* during the short period between the filing of the petition and this reply further underscores how this case presents an important and timely question that merits plenary consideration.

CONCLUSION

For the reasons set forth above and in the petition, this case presents an appropriate vehicle for resolving the conflict in the circuits. The petition for a writ of certiorari should be granted.

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News, Oct. 10, 1997, available in 1997 WL 4055786 (Widow of baseball great Curt Flood sued city, police officers and production company of reality-based show *Placas* for raiding her home during a party "to provide the reality-based show *Placas* with 'exciting footage'").

4. Counsel of Record for Respondents here serves as counsel of record for the law enforcement petitioners in *Berger*.

Respectfully submitted,

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APPENDIX

**APPENDIX A — UNITED STATES MARSHALS
SERVICE MEDIA RIDE-ALONG BOOKLET****U.S. Department of Justice****UNITED STATES MARSHALS SERVICE****[SEAL OF UNITED STATES MARSHALS SERVICE]****MEDIA RIDE-ALONGS**

The U.S. Marshals Service, like all federal agencies, ultimately serves the needs and interests of the American public when it accomplishes its designated duties. Keeping the public adequately informed of what the Service does can be viewed as a duty in its own right, and we depend on the news media to accomplish that.

Media "ride-alongs" are one effective method to promote an accurate picture of Deputy Marshals at work. Ride-alongs, as the name implies, are simply opportunities for reporters and camera crews to go along with Deputies on operational missions so they can see, and record, what actually happens. The result is usually a very graphic and dynamic look at the operational activities at the Marshals Service, which is subsequently aired on TV or printed in a newspaper, magazine, or book.

However, successful ride-alongs don't just "happen" in a spontaneous fashion. They require careful planning and attention to detail to ensure that all goes smoothly and that the media receive an accurate picture of how the Marshals Service operates. This booklet describes considerations that are important in nearly every ride-along.

Initially, it's important to realize that not every operational situation lends itself to a ride-along. Some may simply be too

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dangerous or sensitive to have media involved — the risk may outweigh the possible benefits. That may be true in some fugitive apprehension cases, which normally offer the best possibilities for ride-alongs. In other instances, there just won't be the film or photo opportunities the media desire (e.g. solid action sequences) to make the trip worth it. That could hold true for some asset seizures or prisoner transports.

So, we must initially decide whether you have an event that could support a ride-along, realizing that reporters are generally looking for action stories, human interest angles, or unusual

security or other concerns prohibit the release of much information, you probably have a poor ride-along situation to begin with.

Establish Ground Rules

Another good idea — actually, it's an essential one — is to establish ground rules at the start and convey them to the reporter and camera person. Address such things as what can be covered with cameras and when, any privacy restrictions that may be encountered, and interview guidelines.

Emphasize the need for safety considerations and explain any dangers that might be involved. Make the ground rules realistic but balanced — remember, the media will want good action footage, not just a mop-up scene. If the arrest is planned to take place inside a house or building, agree ahead of time on when the camera can enter and who will give the signal.

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If you want liability waivers signed, make sure reporters know this ahead of time and that they sign these statements before the ride-along begins. Retain the signed waivers in your files. For your reference, a sample liability waiver is included as an appendix to this booklet.

Agreeing to an Embargo

If a news embargo is part of the ground rules, discuss this aspect at the time the initial invitation is extended to a reporter. A news embargo simply means that the reporter agrees not to release the story generated by the ride-along until an agreed upon date. For instance, the ride-along may take place within the context of a large-scale fugitive operation you have underway. In that case, you will likely not want any publicity about the operation until its conclusion.

Remember that you will have to clearly define for the reporter the exact nature of the news embargo. Does it apply only to references about the operation? Or is it meant to prohibit the early release of any and all information obtained before and during the ride-along?

And if you arrest a high profile fugitive during a ride-along, other news media may hear of it and break the news. Once that happens, the reporter you've worked with will certainly feel the embargo no longer applies, at least as far as that particular arrest is concerned. Discuss ahead of time just what could be released in that situation, such as information about the arrest but no mention of the on-going operation.

Finally, to avoid nasty surprises, make sure both the reporter and his or her editor agree to the embargo. If they don't,

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Deputies who would be extremely uncomfortable in a media role should not be forced into it. Look instead for those who are particularly articulate for the Service. If they've had prior experience with reporters or news organizations, they are even more valuable.

Coping with "Dry Holes"

What if all goes well in the ride-along except for one thing — you don't achieve the intended objective? The fugitive isn't apprehended or the property can't be seized. It's one of those occasional "dry holes" that happen, but this time a reporter is present to see the failure.

That's a chance you always take in a ride-along, but it doesn't have to be a media failure. The reporter can still see how you operate. He or she can still get a feeling for what Deputy Marshals do and how they do it, as well getting some background footage and story details.

A "dry hole" experience can be used, for instance, to emphasize just how tough a job it is to pursue and apprehend fugitives. Even after days and weeks of substantial investigation, things might not fall perfectly into place. Use the experience to emphasize the many difficulties law enforcement officers face.

In the best circumstances, a "dry hole" will later be followed up by a successful apprehension or seizure at which the media are again present. So it pays to stay in touch with the ride-along media crew. Arrange for them to be ready on very

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short notice if you do locate the fugitive you are pursuing, or if another good ride-along opportunity presents itself. That's why getting their pager numbers and home phone numbers is important. Have your logistics plan in place should a spontaneous, ride-along situation present itself. If a reporter is not available, the editor or producer may want to send a camera person along to record the "action," and have a reporter follow up on the story later.

It's Never Over Until It's Over

Whether the ride-along was successful (resulting in an apprehension, seizure, etc.) or not, reporters may have follow-up questions or need information. The matter doesn't necessarily end when you drop the reporter off at the conclusion of the ride-along. Be prepared to fulfill other information requests related to the case. You may not be able to give them all they need, because of security, privacy, or other considerations, but help them out to the extent you can.

Remember, it's better to help them get accurate facts. Otherwise, the wrong information may just get spread all over the newspapers and across TV screens, leading to more phone calls and other queries than you will want to deal with

This booklet has attempted to address some of the basics of media ride-alongs. The scope is not all-inclusive. It was not intended to cover every situation that arises or every detail that you must consider. Simply put, there are situations that will be unique to each District, and reporters whose requirements will vary from city to city.

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However, if you have other questions concerning ride-alongs that haven't been covered, or you would like advice about a particular media situation, please feel free to contact the Office of Congressional and Public Affairs. The phone numbers are 367-9065 (FTS) or 202-307-9065 (Commercial). We will make every effort to help you plan for a most successful ride-along.